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No. 99-1594

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BUTTS, RAY COOPER, SHANE TALBOT, RAYMOND BENNETT and MICHAEL CROSBY, *Petitioners*,

v.

JAMES McNALLY and JAMES JOHNSON BEY, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF GRANT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Relying primarily on its own analytically unsound decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. (*en banc*) 1992), the Ninth Circuit Court of Appeals has ruled in this case that non-compliance with *Miranda* can violate the Fifth Amendment and may result in *personal* civil liability. This specter of personal liability will inevitably have a chilling effect upon California's 67,000 sworn peace officers as they investigate criminal cases. In addition, the Ninth Circuit appears to be the only federal circuit to have approved potential civil liability for the type of conduct involved in this case; and the ruling contradicts numerous pronouncements from this Court. Accordingly, the State of California has a solemn obligation to seek its correction.

SUMMARY OF ARGUMENT

Miranda's procedures are not themselves constitutional rights. Accordingly, a "violation" of them — even an intentional one — may not give rise to civil rights liability under Title 42 U.S.C. § 1983. Further, even assuming that police engage in coercive conduct during custodial interrogation, their conduct will not support a civil rights cause of action unless it "shocks the conscience," and even then only under the Due Process clause of the Fourteenth Amendment, as opposed to the self-incrimination clause of the Fifth Amendment. Accordingly, the Ninth Circuit has erred egregiously in finding (1) that the conduct involved in this case — which the trial court has already ruled did *not* shock the conscience — can support a civil rights action at all, let alone under the *Fifth* Amendment, and (2) that the law in this area has been so clear and well-established that the officers involved were not entitled to qualified immunity for their conduct.

THE NINTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY TO PETITIONERS BECAUSE THE LAW HAS NEVER BEEN CLEARLY ESTABLISHED THAT IT IS POSSIBLE FOR PEACE OFFICERS IN THE FIELD TO VIOLATE A SUSPECT'S FIFTH AMENDMENT RIGHT AGAINST COMPULSORY SELF-INCRIMINATION

A. Introduction

The Ninth Circuit denied qualified immunity to petitioner police officers because, at the time they conducted the interrogations at issue (1991 for respondent Bey, and 1993 for respondent McNally), a reasonably trained police officer would have known, under "clearly established" law, that the conduct they engaged in — to wit, intentionally "violating" *Miranda* by continuing to question these suspects after they had invoked their right to counsel, in combination with making "false" and "misleading" promises about immunity and, in one case, making disparaging comments about attorneys — constituted a violation of the Fifth Amendment. "Officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions." *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. (*en banc*) 1999).

Amicus State of California contends that the Ninth Circuit erred as a matter of law in that: (1) a *Miranda* violation does not violate the Constitution; (2) although it is possible for police in the field to violate the Constitution, namely, the *Fourteenth* Amendment, their

conduct must "shock the conscience;" and (3) even "conscience-shocking" conduct in the field cannot violate the *Fifth* Amendment's privilege against compelled self-incrimination, which was the only ground before the Circuit Court.

B. A Violation Of *Miranda*'s Procedures, By Itself, Does Not Constitute A Violation Of The Constitution

Noncompliance with *Miranda*'s procedures — even intentional noncompliance — does not violate the Constitution because, as this Court has repeatedly observed, *Miranda*'s only *holding* dealt with the admissibility of evidence, and *Miranda*'s procedures are not themselves constitutional rights.

1. *Miranda*'s Only *Holding* Dealt With The Admissibility Of Evidence

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court recommended certain "procedural safeguards" as a means of obtaining a statement that would be *admissible* at trial without violating the suspect's Fifth Amendment right against self-incrimination. Indeed, *Miranda* itself, as well as numerous subsequent opinions from this Court, have emphasized that the *admissibility of evidence* was the only *holding* of that case:

> . . . [W]e deal with the *admissibility* of statements obtained from an individual who is subjected to custodial police interrogation . . . .

Miranda, at 439 (emphasis added).

> Our holding . . . briefly stated . . . is this: the prosecution may not *use* statements . . .

> stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Miranda, at 444 (emphasis added).

> The constitutional issue we decide in each of these cases is the *admissibility* of statements obtained from a defendant questioned while in custody . . . .

Miranda, at 445 (emphasis added).

> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the *admissibility* of any statement made by a defendant.

Miranda, at 476 (emphasis added).

> In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses *cannot be introduced into evidence* to establish his guilt.

Berkemer v. McCarty, 468 U.S. 420, 429 (1984) (emphasis added).

> When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be *excluded from evidence at trial* in the State's case in chief.

Oregon v. Elstad, 470 U.S. 298, 317 (1985) (emphasis added).

2. *Miranda*'s Procedures Are Not Themselves Constitutional Rights

With like consistency, this Court has repeatedly observed that *Miranda*'s procedures, while integral to the protection of a criminal defendant's Fifth Amendment right at *trial*, are merely prophylactic in nature and are not themselves constitutional rights. Accordingly, the failure by police to follow them, by itself, cannot be sufficient to support a section 1983 civil rights action:

> The Court recognized [in *Miranda*] that these procedural safeguards were not themselves rights protected by the Constitution.

Michigan v. Tucker, 417 U.S. 433, 444 (1974).

> The Court in *Miranda v. Arizona* imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution.

New York v. Quarles, 467 U.S. 649, 657 (1984).

> The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution.'

New York v. Quarles, 467 U.S. at 654.

> The right to counsel established in *Miranda* was one of a series of recommended procedural safeguards that were not themselves rights protected by the Constitution.

Davis v. United States, 512 U.S. 452, 457 (1994).

This principle applies with equal force, of course, to the *Miranda* "rule" at issue here, i.e., the requirement that police scrupulously honor a suspect's invocation of rights by immediately ceasing all further interrogation:

> It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.

Connecticut v. Barrett, 479 U.S. 523, 528 (1987).

In conformance with these clear pronouncements, virtually all federal circuits, including the Ninth, have recognized that *non-coercive* non-compliance with *Miranda*'s procedures does not violate the Fifth Amendment, or any other Amendment, of the United States Constitution:

> This case does not establish a [section 1983] cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak.

Cooper v. Dupnik, 963 F.2d 1220, 1244, 1252.

> [V]iolations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself.

Giuffre v. Bissell, 31 F.3d 1241, 1256 (3rd Cir. 1994).

> The remedy for the alleged *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a civil rights action.

Brock v. Logan County, 3 F.3d 1215, 1217 (8th Cir. 1993). *See also Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989) (*en banc*), *cert. denied*, 490 U.S. 1091.

Accordingly, amicus submits that the Ninth Circuit erred in creating an exception to this principle, to

wit, that if a *Miranda* violation is *intentional*, this renders the resulting statement "coerced" and "involuntary," violates the Fifth Amendment, renders the statement inadmissible for any purpose, and exposes the offending officer(s) to potential *personal* civil rights liability.

C. Although It Is Possible For Police Conduct In The Field To Violate The Fourteenth Amendment, The Conduct Must "Shock The Conscience," Which Petitioners' Conduct Clearly Did Not Do

Obviously, it is *possible* for police in the field to engage in conduct which would render a resulting statement "involuntary" and therefore inadmissible at trial, for instance, by actually coercing the statement through the use of physical force, psychological mistreatment, threats, or official "inducements," such as promises of leniency, benefits, or immunity. *Miller v. Fenton,* 474 U.S. 104, 109 (1985); *Shotwell Mfg. v. United States*, 371 U.S. 341, 348 (1963); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (1997).

However, contrary to the Ninth Circuit's view, not *all* "coercive" police conduct is sufficient to violate a person's civil rights. Stated another way, police conduct may well be sufficiently coercive to render a suspect's statement inadmissible against him at his criminal *trial*, yet still be *in*sufficiently coercive to constitute a violation of the *Constitution* for which the suspect can sue civilly and receive monetary compensation.

Indeed, it has long been the rule that only governmental conduct which "shocks the conscience," i.e., "offends the community's sense of fair play and decency," rises to the level of a constitutional violation, namely, a substantive violation of the Due Process clause of the *Fourteenth* Amendment, as opposed to a violation of the

compulsory self-incrimination clause of the *Fifth* Amendment. *Rochin v. California*, 342 U.S. 165, 172 (1952). *See also Fagan v. Vineland*, 22 F.3d 1296, 1303 (3rd Cir. 1994).

> [T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogation, . . . the Court has continued to measure confessions against the requirements of due process.

Miller v. Fenton 474 U.S. 104, 110 (citations omitted); *accord, Colorado v. Connelly*, 479 U.S. 157, 163 (1986).

Thus, in *Cooper v. Dupnik*, 963 F.2d 1220, 1244, because the majority found the police conduct to be sufficiently outrageous and "shocking," the Ninth Circuit properly upheld the plaintiff's section 1983 civil rights claim under the *Fourteenth* Amendment.[1/]

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1. In *Cooper*, the police admitted to having set out on a calculated plan to deliberately violate the suspect's constitutional rights and to wear him down until he confessed. They ignored his repeated requests to speak to an attorney and "relentlessly" interrogated him for hours, during which time Cooper "was reduced to a state of agitation and anxiety marked by tears and sobbing as he persistently maintained his innocence in the face of [the officer's] onslaught." Cooper was "hammered, forced, pressured, emotionally worn down, stressed, and infused with a sense of helplessness and fear-all in an effort to extract a confession." He was subjected to "sophisticated psychological torture," and his will was "overborne," all of which caused him to later suffer from post-traumatic stress syndrome. *Id.*, 963 F.2d at 1231, 1248. The tape-recorded interviews of Bey and McNally, on the other hand, lasted 15 minutes and 75 minutes, respectively, were conducted professionally and politely, and

In the case at bench, on the other hand, the Ninth Circuit never even discussed the "shock the conscience" standard, that is, it never addressed the question of whether a jury could find that the alleged police conduct, even if fully proven, could reasonably be viewed as offending the community's "sense of fair play and decency," which clearly it could not.

Rather, the Ninth Circuit simply found that the conduct alleged was sufficient to state a cause of action under the *Fifth* Amendment—which *was the only legal ground before it*—because (1) the *Miranda* violation was *intentional*, and (2) it occurred in *combination* with additional "coercive" conduct, to wit, the "false" and "misleading" promises that nothing the suspects said from that point on could be used against them, and, in one case, several pejorative comments disparaging the role of attorneys in the legal process.[2]

Regarding the first point, however, the fact that a police officer makes a conscious decision not to follow one of *Miranda*'s prophylactic directives, as opposed to merely negligently failing to do so, cannot somehow elevate his conduct to a violation of the *Constitution*. Indeed, contrary to the Ninth Circuit's assertions that an intentional violation of *Miranda* renders any subsequent

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contained no indication that either suspect was physically uncomfortable or emotionally upset.

2. In its recent decision in *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999), the Ninth Circuit went even further by granting habeas corpus relief, on the basis of a *Fifth* Amendment violation, where the offending officer did no more than intentionally ask the suspect, who had just invoked his *Miranda* right to counsel, an additional question, which resulted in a damaging admission. Even though this initial incriminatory statement by the suspect was clearly "voluntary" by traditional standards since no other arguably "coercive" conduct had occurred as of that point, the Ninth Circuit found it to be "involuntary" and therefore inadmissible due to the *intentional* nature of the *Miranda* violation. (*Id.*, at 1029.)

statement coerced and therefore "involuntary" under the *Fifth* Amendment (see *Henry v. Kernan*, 197 F.3d 1021, 1029, and *Cooper v. Dubnik*, 963 F.2d 1220, 1238-1244), this Court has said that "[a] *Miranda* violation does not constitute coercion" (*Oregon v. Elstad*, 470 U.S. 298, 306, fn. 1), and that "a *Miranda* violation 'does not mean that the statements received have actually been coerced, . . . '" *Arizona v. Fulminante*, 499 U.S. 279, 293, fn. 7 (1991).

In addition, as this Court recognized many years ago, although the rule of *Harris v. New York*, 401 U.S. 222 (1971), might tempt police to *deliberately* decide not to follow *Miranda*, any such choice would *not* preclude a resulting statement's use for impeachment purposes, so long as the statement was "voluntary" by traditional standards:

> One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have *little to lose* and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. *In any event, the balance was struck in Harris and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness.*

Oregon v. Hass, 420 U.S. 714, 723 (1975) (emphasis added).

Similarly, regarding the Ninth Circuit's second point, the officers' assurances that nothing the suspects

said from that point on would be used against them in court likewise patently fails to "shock the conscience." Indeed, in amicus' view, such assurances were not even "false" or "misleading," as the Ninth Circuit characterized them, but rather were self-fulfilling and therefore *true*. For if the government promises that a statement will not be used in court, then, out of fairness, *it may not be used*, and its admission into evidence will constitute a violation of *procedural* due process at *trial*. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976). In any event, nothing the officers did in this case—whether viewed individually or in combination—can fairly be characterized as "shocking the conscience."[3/]

Perhaps the Ninth Circuit overlooked this crucial Fourteenth Amendment standard because the trial

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3. Almost ten years ago, the Seventh Circuit provided the following cogent summary of this distinction between mildly coercive conduct and conduct so egregious as to give rise to a section 1983 civil-rights action:

> This [i.e., the applicability of the Fourteenth Amendment to police conduct during interrogation] is not to suggest that the federal courts should or will undertake to monitor the details of police interrogations, and to award damages whenever the police cross the line that separates coercive from non-coercive interrogation. The relevant liberty is not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation. We do not undertake to specify a particular threshold, a task that may well exceed our powers of articulation. *But it is a high threshold*, and to cross it Wilkins and plaintiffs like him must show misconduct that a reasonable person would find *so beyond the norm of proper police procedure as to shock the conscience*, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff.

Wilkins v. May, 872 F.2d 190 (7th Cir. 1989) (emphasis added).

(district) court had previously *dismissed* plaintiffs' claim under that Amendment, expressly ruling that petitioners' conduct did *not* shock the conscience. *See* Petition for Writ of Certiorari, Appendix B-1 and C-1. Or, perhaps, the Ninth Circuit avoided this vital discussion because it is so obvious that the conduct involved here did not reach the required "high threshold."

Regardless of the reason behind this omission, however, it represents a fundamental and far-reaching error, for it opens the door to potential civil liability, under the *Fifth* Amendment, based on nothing more than *mildly* coercive, "non-shocking" conduct, a result which, as will be shown next, conflicts with established authority.

D. Even "Shocking" Conduct In The Field Cannot Violate The Fifth Amendment

Regardless of how petitioners' conduct is characterized, amicus submits that it cannot have violated the *Fifth* Amendment, which, as has been noted, *was the only legal ground before the Ninth Circuit.*

As this Court and numerous circuit courts have recognized, the Fifth Amendment is a *trial* right, that is, it may be violated only when a statement that has been actually coerced, or presumptively compelled, *is admitted into evidence at trial:*

> . . . [I]n protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental *trial right*.'

Withrow v. Williams, 507 U.S. 680, 691 (1993) (original emphasis).

> The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants.

> Although conduct by law enforcement officers prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*

United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added).

> The Fifth Amendment does not forbid the forcible extraction of information but only the *use* of information so extracted as evidence in a criminal case—otherwise, immunity statutes would be unconstitutional.

Wilkins v. May, 872 F.2d 190, 194 (emphasis added); *accord*, *Mahoney v. Kersey*, 976 F.2d 1054, 1061-1062 (7th Cir. 1992).

> The dissents in *Cooper*, however, make persuasive arguments that the privilege against self-incrimination is not violated until the evidence is *admitted* in a criminal case.

Wiley v. Doory, 14 F.3d 993, 998 (4th Cir. 1994) (emphasis added); *accord*, *Giuffre v. Bissell*, 31 F.3d 1241, 1256.[4]

> While Fifth Amendment concerns can certainly be *implicated* prior to trial, the Supreme Court has declared that a Fifth Amendment *violation* occurs only when self-incriminating statements are *introduced at trial*, thereby compelling the defendant to 'become a witness against himself.'

Riley v. Dorton, 115 F.3d 1159, 1165 (4th Cir. 1997) (emphasis added).

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4. The three dissenting Judges in *Cooper* reviewed numerous Fifth Amendment cases and concluded that "it is the *use* of coerced statements that constitutes a Fifth Amendment violation," rather than the manner in which statements are obtained. *Id.*, at 1254 (original emphasis).

Accordingly, the Ninth Circuit erred egregiously in ruling that police conduct in the field—particularly conduct as mild as that involved here—can justify a section 1983 civil rights suit for a violation of the *Fifth* Amendment's privilege against compulsory self-incrimination.

E. Because The Law In This Area Has Never Been "Clearly Established," Petitioners Were Entitled to Qualified Immunity

The doctrine of "qualified immunity" shields police officers from individual liability, even for civil rights violations, unless the officers violate "clearly established statutory or constitutional rights . . . ." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In order to be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 638-639 (1987).

In light of the authorities previously cited, it seems ludicrous to find that a "reasonable" officer in this case would or should have known that intentionally continuing to question these suspects, in combination with a (true) promise that nothing the suspects said henceforth could be used against them and, in one case, with some disparaging remarks about attorneys, so clearly violated the *Constitution* that the officer would be exposing himself to potential *personal* civil liability.

Indeed, as the Fourth Circuit noted upon looking back at the Ninth Circuit's 1992 *Cooper* case:

> The disagreement between the judges of the Ninth Circuit as to the correct interpretation of the relevant constitutional principles indicates

> that *even at the time of the Cooper decision, the law was not clearly established.*

Wiley v. Doory, 14 F.3d 993, 998 (emphasis added).[5]

Thus, while it is clear that the officers here violated one of *Miranda*'s safeguards, it is far from clear that their conduct violated any part of the United States Constitution, much less the Fifth Amendment's privilege against compelled self-incrimination. Accordingly, the Ninth Circuit erred in not granting qualified immunity to the petitioners; and unless this Court acts to correct this error, the specter of potential *personal* civil liability under the Fifth Amendment for *Miranda* errors will have a far-reaching and adverse effect upon law enforcement all across this nation.

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5. Obviously, the lack of clarity continues, as evidenced by the controversy surrounding the case of *Dickerson v. United States*, No. 99-5525, currently pending before this Court.

CONCLUSION

Whether in 1991, 1993, or today, there has never been "clearly established" law to the effect that what the police did here violated *any* constitutional right of the plaintiffs, particularly not the Fifth Amendment. Indeed, to the extent the law has been "clearly established," it indicates quite the contrary, namely, (1) that police non-compliance with *Miranda* does not violate the Constitution, (2) that the Fifth Amendment's right against compelled self-incrimination is *violated* only when a compelled or coerced statement is *introduced at trial*, not when an officer *obtains* it in the field; and (3) that the "coercive" conduct in this case does not "shock the conscience" and in fact was so *de minimus* as to result, at most, in statements that were inadmissible at trial.

Accordingly, amicus State of California submits that the Ninth Circuit erred in finding that the respondents have adequately alleged a civil rights cause of action under the Fifth Amendment, and in denying qualified immunity to the petitioner-officers. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

Dated: May 2, 2000.

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